No. 01-2321

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANK KRASNER ENTERPRISES, LTD., *et al.*,

Plaintiffs / Appellees,

v.

MONTGOMERY COUNTY, MARYLAND,

Defendant / Appellant.

On Appeal from the United States District Court for the District of Maryland
(Honorable Marvin J. Garbis)

BRIEF OF THE STATE OF MARYLAND AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Robert A. Zarnoch
Kathryn M. Rowe
Assistant Attorneys General
90 State Circle, Room 104
Annapolis, Maryland 21401
(410) 946-5600

Attorneys for *Amicus Curiae*

October 2, 2002

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the State of Maryland submits this amicus brief in support of Montgomery County and urges reversal of the District Court decision. The State, which filed an amicus brief below, has an interest in this case for two reasons. First, the decision below misapplies an important Maryland statute that governs the relationship of county and municipal legislation and arrives at a conclusion no Maryland court would have reached. Second, some of the purposes of the challenged Montgomery County ordinance - the discouragement of easy access to firearms and deterrence of gun law violations - - are mirrored in State law provisions governing gun shows, Md. Code, Art. 27, §443A, and in the fact that undercover officers of the Maryland State Police are present at every gun show held in the State.

ISSUE PRESENTED FOR REVIEW

Is a County ordinance which merely denies financial or in-kind support to an organization that allows the display and sale of guns at its facilities inconsistent with Maryland law or the U.S. Constitution?

STATEMENT OF FACTS

The State adopts the County's Statement of the Facts with the addition of the following.

The District Court's opinion notes that Appellee Silverado Promotions has been holding gun shows at "various locations in Maryland." *Frank Krasner Enterprises, Ltd. v. Montgomery County, Maryland,* 166 F. Supp. 2d 1058, 1059 (D. Md. 2001). These other locations are in counties adjoining Montgomery (Prince George's,

Frederick and Howard), all about a half-hour to an hour away from the Agriculture Center in Gaithersburg and that all draw from the same D.C. area market. Silverado offered no testimony below that if it were effectively denied a venue for its shows in Montgomery County, it could not successfully hold additional shows in neighboring counties.

Also relevant to this case is what Maryland law permits to occur at a gun show with respect to the sale and transfer of firearms and ammunition. Those purchasing unregulated firearms, such as a rifle or shotgun, can purchase the weapon on the premises, and can leave the show bearing their weapons. Dealers who are federal firearms licensees do instant background checks on such purchasers, but private gun vendors face no such requirement. Those purchasing regulated firearms, *viz.* handguns and assault weapons, are subject to a background check / waiting period, which necessitates subsequent pickup of the firearm off the premises, often at a gun dealer's place of business. *See* Md. Code, Art. 27, §442. Patrons can buy ammunition at a gun show and carry it home with them.

Under State legislation enacted in 1993, a person who displays a regulated firearm for sale or transfer "from a table or fixed display" at a gun show must first obtain a "temporary transfer permit" from the Secretary of State Police. *See* Md. Code, Art. 27, §443A. Testifying in support of this Administration bill, the Governor's Chief Legislative Officer, David Iannucci, said that "gun shows have become commercial emporiums for the purchase and sale of guns" and noted that the State Police had uncovered illegal acts at certain shows:

> For example, in mid 1991, the Maryland State Police, responding to complaints from licensed firearm dealers about the "smorgasbord" of weapon sales at Maryland gun shows, conducted a surveillance of a gun show in Westminster. Police arrested an individual for selling a handgun banned by the Handgun Roster Board and for displaying and offering for sale an illegal switchblade knife.
>
> A second surveillance was later conducted at a gun show in Frederick and again police made an arrest. This time, however an individual was arrested for acting in the capacity of a dealer by purchasing a handgun at the show and immediately reselling it for profit. Committee Files on SB 330 (1993).

Nor have law enforcement concerns over gun shows diminished since enactment of the 1993 statute. Undercover State troopers are present at every gun show held in Maryland to look for such activities as secondary sales and straw purchases of regulated firearms, attempts to buy parts to convert a firearm to an automatic weapon or to a sawed-off shotgun and suspicious ammunition purchases.[1]

ARGUMENT

I. MARYLAND LAW DOES NOT DENY EFFECT WITHIN A MUNICIPALITY OF A COUNTY FUNDING RESTRICTION REGARDING FACILITIES THAT HOST GUN SHOWS.

This case presents the highly unusual situation of a U.S. district court deciding a major state statutory law issue solely on the basis of federal cases interpreting federal

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[1] A major study of gun shows by the Departments of Justice and the Treasury and the Bureau of Alcohol, Tobacco and Firearms has also concluded that "too often the shows provided a ready supply of firearms to prohibited persons, gangs, violent criminals and illegal firearms traffickers." *See* Department of Justice, Department of the Treasury, and the Bureau of Alcohol, Tobacco and Firearms, *Gun Shows: Brady Checks and Crime Gun Traces* (1999) at 6.

constitutional guarantees. Specifically, the lower court declared inapplicable within the City of Gaithersburg §57-13 of the Montgomery County Code, which denies financial or in-kind support to any organization that allows the display and sale of guns at its facilities and establishes a repayment mechanism if the organization has allowed such sales during a specified period. The sole basis for the District Court decision was its belief that this funding ordinance violated the so-called "Tillie Frank Law," Md. Code, Art. 23A, §2B, a 1983 Maryland statute which governs the effect to be given county ordinances within municipal boundaries.[2] The court concluded that because (1) Silverado desired to conduct its gun shows at a county-supported facility within the boundaries of the City of Gaithersburg; (2) this home rule municipality had exempted itself from the application of certain county ordinances under §2B(a)(3) of Article 23A of the Maryland Code; (3) the City had some authority to regulate gun sales; and (4) based on its reading of federal cases - - mostly examining 10th Amendment issues - - the County ordinance was a "gun show regulation ... in the guise of a discretionary spending provision," 166 F. Supp. 2d at 1061, under §2B(a) the funding restriction "does not apply in [the] municipality". This conclusion represents a fundamental misreading of this Maryland statute and an equation of restrictive funding with government regulation that Maryland caselaw would reject.

The Tillie Frank law does not allow a municipality, such as Gaithersburg, to exempt itself from *all* County legislation, but only those County ordinances that

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[2] Section 2B is called the Tillie Frank Law after the 1981 decision of the Maryland Court of Appeals the statute was intended, in part, to overrule. *See Town of Forest Heights v. Tillie Frank,* 291 Md. 331, 435 A. 2d 425 (1981).

"[r]elate ... to a subject with respect to which the municipality has a grant of legislative authority." No municipality in Montgomery County has a grant of authority to direct how the County chooses to spend or not spend its own funds. Thus, a plain reading of §2B of Article 23A shows it inapplicability to the County funding restriction.

In addition, §2B(b)(2) expressly and unconditionally exempts from municipal control "[c]ounty revenue or tax legislation or legislation adopting a budget". The Committee files on the 1983 legislation (HB 1277) disclose that the "budget exemption" to the Tillie Frank law was added by amendment at the urging of the Maryland Association of Counties (MACO). *See also* Chapter 398, *Laws of 1983.*[3] Both legislative history materials and contemporaneous commentary recognized the broad scope of this exemption. For example, the Summary of Committee Report on HB 1277, dated June 14, 1983 noted that "county revenue, budget, and tax legislation" will continue to apply in municipalities. And in a monograph prepared by the University of Maryland's Institute for Governmental Service shortly after enactment states that under the Tillie Frank Law, "any county legislative act having to do with adoption of the county budget shall apply in the municipalities." *See* E. Kelleher, *County and Municipal Legislative Power: A Review of HB 1277* (Institute for Governmental Service, Univ. of Md.) (June 20, 1983) at 4.

The Tillie Frank Law also essentially codified Maryland decisional law making

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[3] The First Reader version of this bill was the product of a gubernatorial study group. *See Report of the Governor's Task Force on County & Municipal Powers* (Jan. 18, 1983). The proposal was clearly a compromise measure that did not entirely please municipal representatives or county advocates. *See Id.* at Supplement I and Supplement II.

county tax laws applicable within municipal boundaries. The Maryland case codified, *Mont. Co. v. Md. Soft Drink Ass'n.,* 281 Md. 116, 377 A. 2d 486 (1977), is more relevant to the interpretation of the 1983 statute than any federal case cited by the District Court. This decision involved a Montgomery County beverage container tax which was attacked by the City of Rockville on the grounds that the tax amounted to regulation which could not have effect within its municipal boundaries. In upholding the tax, the Court of Appeals of Maryland reasoned that when it appeared from the face of the law that it involved no direct regulation and revenue was the law's main objective, it was valid notwithstanding the fact that an attempt to regulate may have been the motive of the legislators who voted for the measure or that "a possible collateral economic effect of the tax may be to regulate the consumer's purchasing habits". 281 Md. at 132-35.

If Montgomery County's gun show funding restriction is analyzed in light of this decision, it clearly passes muster. On its face, the ordinance is clearly a budget measure, containing the conditions under which entities may receive county funds or benefits. The repayment feature emphasizes the ordinance's funding concerns. The county law does not directly regulate the conduct of gun show promoters or their customers and whatever indirect regulation may result from the ordinance is of no consequence to the validity of the measure.

Three other Maryland cases address the distinction between a funding restriction or condition of a political subdivision and a legislative regulation or prohibition and in each case the Court of Appeals said that the funding restriction was not tantamount

to a regulation or prohibition. In *Wilson v. Bd. of Sup. of Elections,* 273 Md. 296, 328 A.2d 305, (1974), the Court upheld a Baltimore City charter amendment that prevented the City from using public funds to construct a professional sports stadium, concluding that the amendment did not impermissibly forbid the construction of any stadium. In *Prince George's Co. v. Chillum-Adelphi,* 275 Md. 374, 340 A. 2d 265 (1975), the Court rejected a contention that a charter provision authorizing certain budgetary restriction with respect to volunteer fire companies impermissibly gave the County "control" over these private entities. At the same time, the Court said that the County could impose a number of "reasonable regulations" on fire companies accepting county funds:

> We have been cited to no authority under which the County could prescribe budgetary procedure or policy to a volunteer fire company which does not accept County funds. However, if a given volunteer fire company elects to accept County funds, then it follows that the County may impose conditions on the granting and use of those funds, *e.g.,* that the company's books would be kept in a certain manner, that the funds granted would be only expended for certain specified purposes, and that to assure the County of this fact the company's books would be subject to audit by persons designated for that purpose by the County. Indeed, the County might well specify that no part of the funds would be expended for new equipment without advance approval of the county, might say what type of equipment could be purchased with funds from the County, and might provide for the manner of maintaining equipment purchased with County funds. In other words, the County may impose reasonable regulations relative to the funds which come from it. On the other hand, if a volunteer fire company does not accept County funds, it is only subject to such

> regulations of the County as may be imposed under the police power.

Id. at 382-83.

Finally, in *East v. Gilcrest,* 296 Md. 368, 463 A. 2d 285 (1983), the Maryland Court *in dicta* appeared to reject a lower court's conclusion that a charter amendment prohibiting the expenditure of county funds for the operation of landfills on property zoned for residential use was a zoning regulation in conflict with state law. Specifically, the decision stated that:

> It is important to keep in mind, as the plaintiffs have repeatedly pointed out, that §311A of the Montgomery County Charter does not regulate the site selection for sanitary landfills, does not prohibit sanitary landfills in residentially zoned areas, and does not prohibit the county's operation of a landfill in a residential area if county funds are not used. Under §311A, landfills may be constructed and operated in residential zones as long as the funding comes from private sources or the state government or the federal government. Section 311A merely prohibits the expenditure of *county* funds for the operation of a landfill on residentially zoned property.

Id. at 372-73.[4]

If the District Court had examined the Montgomery County ordinance in light of these State cases rather than unrelated federal constitutional law cases, it could only have concluded that the funding / benefit restriction bears none of the features of regulation or prohibition identified in *East* and *Wilson.* The challenged ordinance does

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[4] The lower court's decision on this issue was vacated, 296 Md. at 374, but the appellate court otherwise affirmed, because the charter amendment conflicted with a state law requiring the county to pay for the construction costs of a landfill after the State Secretary of Environment had so ordered. *Id.* at 373.

not regulate or prohibit gun shows or affect gun shows at facilities that do not receive county funds or benefits. In addition, the conditions set forth in the ordinance are less restrictive than the "reasonable [spending] regulations" upheld in *Chillum-Adelphi.* And as *Maryland Soft Drink Association* teaches, even if the funding ordinance could be read as indirect regulation of gun shows, it is nevertheless valid.

If the Tillie Frank Law issue were presented to a Maryland court, the State contends that the result would be the same as that recently reached by the Supreme Court of California in *Great Western Shows, Inc. v. County of Los Angeles,* 118 Cal. Rptr. 2d 746 (2002). There, on certification from the U.S. Court of Appeals for the 9th Circuit, the California Court rejected a U.S. District Court's conclusion that under State law, a county was precluded from regulating the sale of firearms at gun shows on county property located within a municipality. Specifically, the California Court said that:

> [I]n this case the County is not seeking to exercise concurrent jurisdiction. As discussed above, *Government Code section 23004,* subdivision (d), authorizes the County to manage its own property, and that includes deciding how the property may be used, whether that decision is embodied in a contract with a private party, in an ordinance, or in some combination of the two. The City of Pomona does not and may not dictate how the County uses its property. ... By enacting an ordinance that seeks to regulate the use of its own property, but not the conduct generally of the citizens of Pomona, the County is not exercising regulatory jurisdiction that is coextensive with Pomona. (citations omitted). 27 Cal. 4th at 871-72; 44 P. 2d at 131-32; and 118 Cal. Rptr. 2d at 759-60.

The same could be said of Montgomery County's control over its own funding

decisions.

For these reasons, the lower court's decision that the County funding restriction can not apply in the City of Gaithersburg is erroneous and the judgment below must be reversed.[5]

II. A COUNTY ORDINANCE THAT DENIES FUNDING TO A ORGANIZATION THAT PERMITS THE DISPLAY OF GUNS AT ITS FACILITY DOES NOT VIOLATE THE FIRST AMENDMENT OR DENY EQUAL PROTECTION OF THE LAW.

The lower court expressly declined to address Silverado's First Amendment and Equal Protection challenge to the County funding ordinance. *Frank Krasner Enterprises v. Montgomery County,* 166 F. Supp. 2d 1058, 1063 (D. Md. 2001). However, these claims will likely be pressed as alternative grounds for the decision below. Therefore the State will discuss them.

A. The Ordinance Does Not Violate the First Amendment.

Silverado raised separate First Amendment claims for Montgomery Citizens for a Safer Maryland (MCSM), which had tables and shared information and literature at gun shows, and for the dealers who seek to sell guns and display them for sale at gun

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[5] Although this Court has rejected an earlier motion by Montgomery County that the State law issue in this case be certified to the Court of Appeals of Maryland, the State of Maryland respectively suggests that after full briefing and argument the Court may want to revisit this issue. This Court has recognized that "significant issue[s] of State law" are "best resolved in State court." *Shanaghan v. Cahill,* 58 F. 3d 106, 112 (4th Cir. 1995). *See also Elkins v. Moreo,* 435 U.S. 647, 662 n. 16 (1978)("In a federal system, it is obviously desirable" for vitally important issues of state law and public policy to be "decided in the first instance by state courts ... Where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it"); and *Great Western Shows, Inc. v. Los Angeles,* 229 F.3d 1258 (9th Cir. 2000) and *Nordyke v. King,* 229 F.3d 1266 (9th Cir. 2000) (certifying to California Supreme Court state law issues in gun show litigation).

shows. However, the challenged ordinance does not impinge upon the First Amendment rights of any party.

First, § 57-13 places no limits on the speech of groups such as MCSM who do not sell guns or display them for sale. They may engage in any speech regarding guns or any other issue, distribute any literature and associate with any person, without limit as to place, time, manner, content, or viewpoint, and none of these activities will trigger the funding provisions of the ordinance. Silverado, however, argues that the ordinance violates the First Amendment rights of advocacy groups such as MCSM because it allegedly makes it impossible for gun shows to be held in the County, and, they assert, a gun show is the single most effective place for a group like MCSM to meet and communicate with like-minded people.

There is no First Amendment right to have the Government fund, or even permit, an activity simply because that activity draws an audience that will also hear a person's speech. For example, a person has a right to write and sell books that discuss illegal drugs, but a law that effectively prevents the sale of such books near drug paraphernalia does not violate the First Amendment. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Mid-Atlantic Accessories Trade v. Maryland*, 500 F.Supp. 834 (D.Md. 1980). Similarly, a person has the right to view sexually explicit materials, but the First Amendment is not violated if an adult video arcade is required to display adult films in such a way that no privacy is provided for sexual acts. *People v. B & I News, Inc.*, 211 Cal.Rptr. 346 (Cal.Super. 1984). Silverado cannot base a right to government funding or approval of a gun show on the fact that such a show

would attract people that it wants to talk to and associate with any more than it could require the issuance of an alcoholic beverages license because more people would hear what it had to say if it served alcohol.

Nor does § 57-13 place limits on the commercial speech of either the sponsor of the gun show or on the sellers of guns. Instead, it is directed at specific conduct that the County does not want to sponsor. Section 57-13 does not affect gatherings at which persons engage in any type of speech about guns, gatherings at which guns are displayed but not sold, or even gatherings at which guns that are available for purchase elsewhere are displayed. It is directed only at conduct, at the sale of guns and the display of guns for sale at locations that receive County funds. The mere fact that speech is used in the offer of a gun for sale, or in the acceptance by the purchaser, does not turn the sale of guns into speech protected by the First Amendment. *Suter v. City of Lafayette*, 67 Cal.Rptr.2d 420, 431 (App. 1997) (Commercial activity, such as buying and selling a product, is not accorded First Amendment protection).[6] Instead, the sale of a product will be found to implicate First Amendment protections only where the goods themselves bear a message or where the sale conveys a particularized message that would likely be understood by the purchasers. *Al-Amin v. City of New York*, 979 F.Supp. 168, 173 (E.D.N.Y. 1997), *cf. Northern Indiana Gun & Outdoor*

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[6] *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997) is not to the contrary. In that case, the Court recognized that the sale of a gun was not speech, but found that a lease provision barring an offer to sell firearms at a gun show infringed protected commercial speech. Even assuming that the offer to sell a gun is protected commercial speech in the context of a lease that also bars the sale of guns, the funding restriction in question is not triggered by an offer to sell a gun, only by sale or display for sale on the premises.

Shows v. Hedman, 104 F.Supp.2d 1009, 1013 (N.D.Ind. 2000). The sale of a gun simply is not speech within the meaning of the First Amendment. *Nordyke v. Santa Clara County*, 110 F.3d 707, 710 (9th Cir. 1997)

Display of guns incident to their sale is also conduct that may be regulated without implicating the First Amendment. Lower federal courts have held that regulation of where a product may be displayed for sale does not implicate First Amendment rights. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 53 (1st Cir. 2000); *Lorillard Tobacco Company v. Reilly*, 84 F.Supp.2d 180,195 (D.Mass. 2000); *Rockwood v. City of Burlington*, 21 F.Supp.2d 411 (D.Vt. 1998) (all involving requirement that tobacco products be displayed out of the reach of minors); *Sherwin-Williams v. City & County of San Francisco,* 857 F.Supp. 1355 (N.D.Cal. 1994) (lock up requirement for spray paint).[7] And, in *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982) the Supreme Court questioned whether a statute that effectively limited the manner in which literature concerning drug use could be displayed impacted any First Amendment interest, noting that all that was at stake was "the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires."

Even if the funding restrictions were found to have an incidental effect on

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[7] The Supreme Court, in its review of the *Lorillard* case, avoided the issue of whether the location and manner of display constituted speech by finding that the regulations would meet First Amendment standards even if they did impinge on commercial speech. However, three justices would have expressly found that no speech was involved, *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404, 2447 (2001) (STEVENS, J, concurring in part and dissenting in part). No justice took the position that display was speech.

speech, they do not violate the First Amendment. As recognized by Silverado below, the analysis for a regulation of conduct that is alleged to impinge on expression is set out in *United States v. O'Brien*, 391 U.S. 367 (1968), which requires for such a regulation to pass constitutional muster that it be within the constitutional power of the State, that it further an important or substantial State interest that is unrelated to the suppression of free expression, and that the incidental restriction on First Amendment freedoms be no greater than is necessary to the furtherance of that interest.

The regulation of the display and sale of guns in public places and the control of the expenditure of public funds are well within the constitutional powers of the County. Maryland Code Article 27, § 36H(b); *Prince George's County v. Chillum-Adelphi*, 275 Md. 374, 381-382, 340 A. 2d 265 (1975).[8] Just as a public entity has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the County has a compelling interest in ensuring that County funds are not used to further the sale of guns, thus removing any County involvement in an activity that could increase the already unacceptable level of gun violence in the County. The denial of funding to facilities that permit the sale of guns directly serves this purpose. As such, this situation can be differentiated from that in *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997), where the County, in defending a lease restriction on the holding of gun shows, simply asserted a generalized interest in avoiding the

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[8] Effective October 1, 2002, Art. 27, §36H will be codified as §4-209 of the Criminal Law Article.

appearance that the County promoted gun usage. The funding restrictions can also be justified on the basis of a contribution to public safety in addition to the County's interest in not funding the sale of guns. This justificaiton would not require a showing that Silverado's gun shows have created a threat to public safety, but only that gun shows generally could do so. *United States v. Edge Broadcasting*, 509 U.S. 418, 430-431 (1993) ("we judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery States, not by the extent to which it furthers the government's interest in an individual case."). Testimony before the Montgomery County Council, as well as letters and e-mail sent on this issue, reflect that gun shows are a source of guns used in crime and that they provide a venue in which "straw man" sales are more likely. (J.A. 236 and 240). Among the materials cited by Council witnesses was a report from 1999 by the Department of Justice, the Department of the Treasury and the Bureau of Alcohol, Tobacco and Firearms that reflects that "gun shows provide a forum for illegal firearms sales and trafficking." *Gun Shows, Brady Checks and Crime Gun Traces* (January 1999), p.6. Specifically, the study found that felons have been able to purchase guns at gun shows, and that firearms so purchased were subsequently used in crimes. *Id.* at 7. The County is entitled to rely on this type of evidence concerning crimes elsewhere in making the decision to withhold County funds from facilities that allow gun shows. *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382, 1395 (2000) (plurality).

While it is true that Maryland has tightened restrictions on private sales, and thus removed some loopholes that can contribute to problems at gun shows, it is also

true that some aspects remain unregulated and that the private sale of an unregulated gun from an exhibitor's or other person's private collection is not restricted or monitored in any way at a gun show. In addition, the County is entitled to take notice, as it did in the Legislative Request Report (J.A. 239) that "the transitory nature of gun shows makes the enforcement of the applicable legal requirements especially difficult." Finally, contrary to the conclusion of the Court in *Nordyke v. Santa Clara County*, 110 F.3d 707, 713 (9th Cir. 1997) with respect to the lease restriction in that case, the funding restriction need only further the County's interest in checking the proliferation of guns, it need not be a solution in itself. *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382, 1397 (2000). Because the funding restriction serves the County's interest in not funding the sale of guns, and also contributes to the County's goal of reducing or eliminating gun violence in the County, the funding restriction meets the second portion of the *O'Brien* test, by furthering substantial county interests that are unrelated to the suppression of free expression.

Finally, the provision is narrowly drawn. It only reaches gun shows at facilities that receive County funding, not those at other facilities. And, where it applies, the funding restriction is triggered only by the sale of guns and the display of guns for sale. It does not reach any other activity that might take place at gun shows, and the teaching of firearms safety and other educational and sporting use of guns is exempt, not only from the funding restrictions, but from all restrictions on guns in or near places of public assembly. Because the funding restrictions, even if they are seen as affecting free expression, meet the *O'Brien* requirements they do not violate the First

Amendment.[9]

For similar reasons, any limitations that the funding restrictions are found to place on the commercial speech of dealers would not violate the First Amendment. Restrictions on commercial speech are analyzed under the test set out in *Central Hudson Electric Corp. v. New York Public Service Commission*, 447 U.S. 557, 566 (1980), which held that regulation of commercial speech that concerns lawful activity and is not misleading will be upheld if the regulation directly advances a substantial government interest, and is no more extensive than is required to serve that governmental interest. This test applies to all challenges to regulations of commercial speech, even if the regulation is content-based. *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404, 2421 (2001), and even where non-commercial speech is mixed with commercial speech, unless it is shown that the two are inextricably intertwined. *Bolger v. Youngs Drugs Products Corp.*, 463 U.S. 60, 67-68 (1983).

The Supreme Court has made clear that the *Central Hudson* test is no more exacting than the test applicable to incidental restrictions on expressive conduct under *O'Brien*. *United States v. Edge Broadcasting*, 509 U.S. 418, 429 (1993). In fact there is substantial overlap between the two tests. Since the funding restrictions pass muster under the *O'Brien* test, any restriction on commercial speech would also be justified under the First Amendment.

Other claims raised by Silverado below are equally without merit. While

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[9] The funding restriction would also be upheld if analyzed as a content-neutral time, place and manner restriction, as the test applicable to such a claim is closely related to the *O'Brien* test. *Barnes v. Glen Theatre, Inc*, 501 U.S. 560, 566 (1991).

Silverado claimed a right to government funding below, no case supports the conclusion that denial of funding to one party can deny the First Amendment rights of a third party. Moreover, each of the cases cited involved core speech rather than an incidental burden imposed by a regulation of conduct or a regulation of commercial speech. Nor has any of these cases involved a regulation such as this one that is neither viewpoint nor content-based.[10] Quite simply, Silverado has no right to government funding of its First Amendment activities. *Maryland Public Interest Research Group v. Elkins,* 565 F.2d 864 (4th Cir. 1977), *cert. denied,* 435 U.S. 1008 (1978).

B. The Ordinance Does Not Deny Equal Protection of the Law.

Finally, it is clear that the appropriate test to be applied to Silverado's Equal Protection challenge is rational basis and that the funding restrictions easily meet that test. Facilities that permit the sale of guns are not a suspect class, and the sale of guns is not a fundamental right. *Olympic Arms v. Magaw*, 91 F.Supp.2d 1061 (E.D.Mich. 2000); *Rupf v. Yan*, 102 Cal.Rptr.2d 157 (App. 2000). "The particular and unique risk associated with the operation of a gun show" provides a rational basis for differential treatment of these shows. *Pavlides v. Niles Gun Show, Inc.*, 679 N.E.2d 728, 734 (Ohio.App. 1996). And the character of guns themselves as instruments of injury and death provides ample justification for treating them differently than other products and restricting the places that they may be sold. *Northern Indiana Gun and Outdoor*

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[10] Silverado admitted below that the regulation was not content-based. Plaintiffs' Memorandum in Support of Supplemental Motion for Summary Judgment as to Counts IV, V, VI, and VII at page 23.

Shows v. Hedman, 104 F.Supp.2d 1009 (N.D.Ind. 2000); *Olympic Arms v. Magaw*, 91 F.Supp.2d 1061 (E.D.Mich. 2000); *Rupf v. Yan*, 102 Cal.Rptr.2d 157 (App. 2000); *California Rifle & Pistol Assn. v. City of West Hollywood*, 78 Cal.Rptr.2d 591 (Cal.App. 1998).

CONCLUSION

For all of these reasons, the decision of the district court should be reversed. In addition should this Court decide to resolve Silverado's constitutional claims, the State urges the Court to find the County ordinance constitutional.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Robert A. Zarnoch
Kathryn M. Rowe
Assistant Attorneys General
90 State Circle, Room 104
Annapolis, Maryland 21401
(410) 946-5600

Attorneys for *Amicus Curiae*

October 2, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2321 **Caption:** Frank Krasner Enterprises, Ltd., et al. v. Montgomery County, Maryland

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(A)(7)

COUNSEL MUST COMPLETE AND INCLUDE THIS CERTIFICATE IMMEDIATELY BEFORE THE CERTIFICATE OF SERVICE FOR ALL BRIEFS FILED IN THIS COURT.

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I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.

Robert A. Zarnoch
Signature of Filing Party

10-02-02
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2002, I sent by first class mail, postage prepaid, two copies of the Brief of *Amicus Curiae* to : Jonathan P. Kagan, Esq. and Alexander J. May, Esq., Brassel & Baldwin, PA, 112 West Street, Annapolis, Maryland 21401, Attorneys for Plaintiffs / Appellees, and Charles W. Thompson, Jr., Marc P. Hansen, Karen L. Federman Henry, Clifford L. Royalty, and Judson P. Garrett, Jr., 101 Monroe Street, Third Floor, Rockville, Maryland 20850, Attorneys for Defendant / Appellant.

Robert A. Zarnoch

ROBERT A. ZARNOCH